Letchumanan a/l Suppiah v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–44 OF 2005 (W) AND 05–45 OF 2005
ALAUDDIN PCA, HASHIM YUSOFF AND ZULKEFLI FCJJ
10 JULY 2009

Criminal Procedure — Appeal and cross-appeal — Appellate court, power and duty of — Dangerous drugs — Trafficking — Dangerous Drugs Act 1952 s 39B — Charge reduced to possession on appeal to Court of Appeal — Respondent ordered to enter defence — Appeal against reduced charge — Whether acquitted of original charge — Whether appealable

The respondent, in this appeal, was originally charged for trafficking dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). At the close of the prosecution's case, he was acquitted by the High Court without his defence being called. Against this decision, the prosecution appealed to the Court of Appeal. The Court of Appeal thereafter ordered the respondent to enter his defence on a reduced charge of possession of the said drugs under s 12(2), punishable under s 39A of the Act. Hence, this appeal by the prosecution against the said decision. The respondent cross-appealed against the decision of the Court of Appeal in calling for his defence on the reduced charge of possession. The prosecution raised a preliminary objection against the cross-appeal by the respondent on the ground that he had no right of appeal as the decision of the Court of Appeal had not finally disposed of his rights yet. Similarly, the respondent also raised objection against the prosecution's appeal against the Court of Appeal's decision of acquitting him on the trafficking charge at the end of the prosecution's case and ordering him to enter his defence on a charge of possession of the said drugs. The issue for consideration of this court was: whether the respondent could in the course of the appeal by the prosecution before this court against the decision of the Court of Appeal in calling for his defence of possession and not trafficking of the said drugs, challenge that decision through the back door by submitting in the course of his reply to the prosecution's appeal that he should have been acquitted.

Held, allowing the prosecution's appeal and striking out the respondent's cross-appeal:

(1) (per **Hashim Yusoff FCJ**) The original charge against the respondent was one of trafficking. The effect of the Court of Appeal's decision to call the defence on the reduced charge of possession would mean that the respondent had been acquitted of the original charge of trafficking. If the trial were to continue on the basis of possession, then the respondent could only be required to rebut the presumption of possession. It would also mean that the prosecution could only get back the original charge of trafficking by appealing to the Federal Court at this stage, as it did in the instant appeal (see paras 1 9).

(2) (per **Hashim Yusoff FCJ**) The effect of the Court of Appeal's order was that the charge of trafficking had been finally disposed of by calling for the defence for possession only. This would be the correct time for the prosecution to appeal against the Court of Appeal's decision if it wanted the case to continue on the trafficking charge and not wait to file its appeal at the end of the whole trial (see para 9).

(3) (per **Hashim Yusoff FCJ**) The respondent was not prejudiced if this court were to allow the prosecution's appeal at this stage of the trial by reversing the Court of Appeal's decision and calling upon the respondent to make his defence on the original trafficking charge because he would still have the right and the chance to raise a reasonable doubt in the prosecution's case. Even if he were to be found guilty and then convicted on the trafficking charges, the respondent would still have his right to appeal to the Court of Appeal and further to the Federal Court. The respondent would still not be deprived of the right provided by the law for the two tiers of appeal (see para 11).

(4) (per **Zulkefli FCJ**) When the law has precluded an accused from appealing, it must be given full effect. To allow otherwise would mean providing the accused with an avenue of appeal at this stage contrary to what the law has prohibited. Although, s 92 of the Courts of Judicature Act 1964 ('CJA') gives the Federal Court a very wide power when it hears an appeal, that power however, can only be exercised subject to s 87 of the CJA, that is the appeal must be competent before the court. Therefore, even if the record of appeal was before the court, the law precluded the court from going into the merits favouring the accused at this stage (see paras 16–17).

(5) (per **Zulkefli FCJ**) A matter of convenience cannot override a substantive prohibition. The accused was in no way deprived of the two tiers of appeal provided under the CJA as it was still open to him to appeal after the conclusion of the trial by the trial court (see para 17).

(6) (per **Zulkefli FCJ**) The appellate court should not interfere on a matter which has not been finally disposed of, a matter which is still pending before the trial court even if the matter has come up before the appellate court (see para 18).

[Bahasa Malaysia summary

Responden, dalam rayuan ini, pada asalnya dituduh mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada penutup kes pendakwaan, dia dilepaskan oleh Mahkamah Tinggi tanpa pembelaan dipanggil. Pihak pendakwaan merayu terhadap keputusan ini ke Mahkamah Rayuan. Mahkamah Rayuan kemudiannya memerintahkan responden membela dirinya atas tuduhan yang lebih ringan iaitu tuduhan memiliki dadah tersebut di bawah s 12(2), yang boleh dihukum di bawah s 39A Akta. Maka, pihak pendakwaan merayu terhadap keputusan tersebut. Responden kemudiannya merayu balas terhadap keputusan Mahkamah Rayuan yang memintanya membela diri atas tuduhan yang lebih ringan iaitu tuduhan memiliki tersebut. Pihak pendakwaan membangkitkan bantahan awal terhadap rayuan balas tersebut atas alasan bahawa dia tidak berhak untuk merayu kerana keputusan Mahkamah Rayuan belum lagi menentukan haknya dengan muktamad. Begitu juga, responden membangkitkan bantahan terhadap rayuan pihak pendakwaan berkenaan keputusan Mahkamah Rayuan yang membebaskan responden atas tuduhan mengedar pada akhir kes pendakwaan dan memerintahkannya membela diri atas tuduhan memiliki dadah tersebut. Isu yang perlu dipertimbangkan oleh mahkamah ini ialah sama ada responden boleh, semasa rayuan oleh pihak pendakwaan di hadapan mahkamah ini terhadap keputusan Mahkamah Rayuan berkenaan yang memerintahkannya membela diri atas tuduhan memiliki dan bukannya mengedar dadah tersebut, mencabar keputusan tersebut mengikut jalan belakang dengan menyatakan, dalam jawapan balasnya terhadap rayuan pihak pendakwaan bahawa dia seharusnya dilepaskan.

Diputuskan, membenarkan rayuan pihak pendakwaan dan membatalkan rayuan balas responden:

(1) (oleh **Hashim Yusoff HMP**) Pertuduhan asal terhadap responden adalah tuduhan mengedar. Kesan keputusan Mahkamah Rayuan memerintahkannya membela diri atas pertuduhan lebih ringan iaitu tuduhan memiliki adalah responden telah dibebaskan atas pertuduhan asal, iaitu mengedar. Jika perbicaraan diteruskan atas dasar memiliki, maka responden hanya perlu mematahkan anggapan memiliki. Ia juga bermaksud bahawa pihak pendakwaan hanya boleh meneruskan dengan pertuduhan asal, pertuduhan mengedar dengan merayu ke Mahkamah Persekutuan pada peringkat ini, seperti yang dilakukan dalam rayuan ini (lihat perenggan 1 & 9)

(2) (oleh **Hashim Yusoff HMP**) Kesan perintah Mahkamah Rayuan ialah tuduhan mengedar akhirnya telah ditentukan dengan memanggil

responden membela diri atas tuduhan memiliki sahaja. Ini merupakan masa yang tepat bagi pihak pendakwaan merayu terhadap keputusan Mahkamah Rayuan jika pihak pendakwaan mahu kes ini diteruskan atas tuduhan mengedar dan tidak menunggu untuk memfailkan rayuan pada akhir perbicaraan penuh (lihat perenggan 9).

(3) (oleh **Hashim Yusoff HMP**) Responden tidak diprejudiskan jika mahkamah ini membenarkan rayuan pendakwaan dalam perbicaraan pada peringkat ini dengan mengakas keputusan Mahkamah Rayuan dan memerintahkan responden membela diri atas tuduhan asal iaitu mengedar kerana dia masih berhak dan berpeluang menimbulkan keraguan munasabah dalam kes pendakwaan. Walaupun dia didapati bersalah dan kemudiannya disabitkan atas tuduhan mengedar, responden masih ada hak untuk merayu ke Mahkamah Rayuan dan seterusnya ke Mahkamah Persekutuan. Responden tidak akan dinafikan haknya seperti yang diperuntukkan oleh undang-undang bagi dua peringkat rayuan (lihat perenggan 11).

(4) (oleh **Zulkefli HMP**) Apabila undang-undang mengecualikan tertuduh daripada merayu, ia haruslah dilaksanakan sepenuhnya. Dengan membenarkan yang sebaliknya, akan memberikan ruang kepada tertuduh untuk merayu pada peringkat ini yang mana berlawanan dengan apa yang ditegah oleh undang-undang. Walaupun s 92 Akta Mahkamah Kehakiman 1964 ('AMK') memberikan kuasa yang luas kepada Mahkamah Persekutuan apabila ia mendengar rayuan, kuasa itu, walau bagaimanapun, tertakluk kepada s 87 AMK, yang mana rayuan tersebut mestilah kompeten di hadapan mahkamah. Oleh itu, walaupun rekod rayuan dikemukakan di hadapan mahkamah, undang-undang mengecualikan mahkamah menentukan merit menyebelahi tertuduh pada peringkat ini (lihat perenggan 16–17).

(5) (oleh **Zulkefli HMP**) Hal perkara yang memudahkan tidak boleh mengatasi larangan substantif. Tertuduh tidak langsung dinafikan haknya atas rayuan di dua peringkat seperti yang diperuntukkan dalam AMK kerana dia masih boleh merayu selepas penentuan perbicaraan oleh mahkamah perbicaraan (lihat perenggan 17).

(6) (oleh **Zulkefli HMP**) Mahkamah rayuan tidak seharusnya mencampuri urusan yang masih belum ditentukan secara muktamad, perkara yang masih lagi berterusan di mahkamah perbicaraan walaupun perkara tersebut dibangkitkan di mahkamah rayuan (lihat perenggan 18).]

Notes

For cases on power and duty of appellate court, see *Mallal's Digest* (4th Ed, 2007 Reissue) paras 189–256.

Cases referred to

Cecil Rajah v PP [1981] 1 MLJ 147, FC (refd)
Koh Zhan Quan Tony v PP and another motion [2006] SGCA 17 [2006] 2 SLR 830, CA (refd)
Lee Pin Seng v PP [1986] 2 MLJ 416, FC (refd)
Megat Najumuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputera (M) Bhd [2002] 1 MLJ 385, FC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 66, 87, 87(1), 92
Dangerous Drugs Act 1952 ss 12(2), 39A, 39B(1)(a)
Federal Constitution art 8
Penal Code s 354
Penal Code [SG] ss 34, 302, 394

Collin Sequerah (Amer Hamzah bin Arshad with him) (Saibullah MV Nathan & Co) for the appellant.
Nurulhuda Noraini bt Mohd Nor (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Hashim Yusoff FCJ:

BACKGROUND

[1] The respondent (accused) in this appeal was originally charged for drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was acquitted by the High Court at the close of the prosecution case without his defence being called. The public prosecutor then appealed to the Court of Appeal against the High Court decision. The Court of Appeal thereafter ordered the respondent to enter his defence on a reduced charge of possession of the said drugs under s 12(2), punishable under s 39A of the Act. Hence this appeal by the public prosecutor against the said Court of Appeal decision and a cross-appeal by the respondent against the decision of the Court of Appeal in calling for his defence on the reduced charge of possession.

PRELIMINARY OBJECTIONS

[2] At the outset of the hearing of the appeal and the cross-appeal before us, the learned DPP raised a preliminary objection against the cross-appeal by the accused on the ground that he had no right of appeal as the decision of the Court of Appeal had not finally disposed of his rights yet. Similarly,

learned counsel for the accused also raised objection against the public prosecutor's appeal against the Court of Appeal's decision of acquitting the accused on the trafficking charge at the end of the prosecution case and ordering the accused to enter his defence on a charge of possession of the said drugs.

[3] The learned DPP's reply to the preliminary objection by the respondent is that the prosecution has a right of appeal against the said decision of the Court of Appeal since by calling the respondent to answer on the reduced charge of possession, it would mean that he was acquitted from the original charge of trafficking in the said drugs. In other words, it was submitted that there was already a final disposal of the matter regarding the trafficking charge.

[4] On this point, learned counsel for the respondent submitted that while conceding that the respondent's appeal was not appealable because the trial of the respondent has not been finally disposed of yet, the prosecution also should have no right to appeal at this stage of the trial otherwise it would mean that the Court of Appeal would have no power to exercise its discretion. Reference was made to art 8 of the Federal Constitution which provides that there should be equality before the law. He submitted it to mean that if the respondent was not allowed to appeal at this stage, then the same should apply to the public prosecutor.

[5] The learned DPP submitted that the right of appeal to the Federal Court against the decision of the Court of Appeal is provided under s 87(1) of the Courts of Judicature Act 1964 ('the CJA') which reads:

> Section 87
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> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.

The word 'decision' (in s 87) is defined in s 3 of the CJA as follows:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

Prior to the amendment of the word 'decision' in 1998, the word 'decision' was defined as follows:

> 'decision' includes judgment, sentence or order.

[6] The purpose of the amendment as found in the explanatory statement to the amendment Bill of Act A1031 which came into force on 31 July 1998 is to avoid any delay in the hearing of a case, because if a dissatisfied party were allowed to appeal against the court's decision regarding the admissibility of any evidence or document then the court would be forced to stay the hearing for the case pending the outcome of the appeal.

[7] In *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 the accused were acquitted by the magistrate's court at the close of the prosecution case on a charge under s 354 of the Penal Code. On appeal to the High Court, the accused were ordered to enter their defence on the said charge. The accused being dissatisfied with the High Court decision, applied for leave to appeal to the Court of Appeal. The Court of Appeal however ruled at p 137 as follows:

> The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At the stage of making the order, certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to 'affect the event of the appeal', meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.

The Court of Appeal further ruled at p 138:

> So, for the purpose of s 50(2) (of the CJA), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

[8] The Court of Appeal in *Saad bin Abas*, relied on two Federal Court authorities ie *Lee Pin Seng v Public Prosecutor* [1986] 2 MLJ 416 and *Cecil Rajah v Public Prosecutor* [1981] 1 MLJ 147 where in both cases, the Federal Court ruled that the court should not interfere with the decision of the learned judge who had ordered the defence to be called after he had heard the appeal against the decision of the sessions court which had acquitted the respective accused at the close of the prosecution case. Although both these cases went to the Federal Court by way of reference under s 66 of the CJA, it goes to show that the order of the Court of Appeal should be upheld so that the trial could proceed smoothly.

[9] Although it is the respondent's counsel's argument that since the respondent could not appeal as the matter has not been finally disposed of yet, therefore the same should apply to the prosecution to prevent them from appealing against the order of the Court of Appeal asking the respondent to

answer on the reduced charge of possession, I would agree with the learned DPP's submission that it does not necessarily mean so. The reason is that the original charge against the respondent was one of trafficking. The effect of the Court of Appeal's decision to call the defence on the reduced charge of possession would mean that the respondent had been acquitted of the original charge of trafficking. If the trial were to continue on the basis of possession, then the respondent could only be required to rebut the presumption of possession. It would also mean that the prosecution could only get back the original charge of trafficking by appealing to the Federal Court at this stage, as it did in the instant appeal. The effect of the Court of Appeal's order is that the charge of trafficking has been finally disposed of by calling for the defence only for possession. It is my considered opinion that this would be the correct time for the public prosecutor to appeal against the Court of Appeal's decision if he wants the case to continue on the trafficking charge and not wait to file his appeal at the end of the whole trial.

[10] In *Koh Zhan Quan Tony v Public Prosecutor and another motion [2006] SGCA 17* reported in [2006] 2 SLR 830 the Singapore court dealt with the issue of whether a conviction of an accused on a lesser charge amounts to an acquittal of the original charge. In that case the accused were originally charged with murder under s 302 read with s 34 of the Penal Code but were convicted of the lesser charge of robbery with hurt under s 394 of the Penal Code. The Court of Appeal said 'the fact that the applicants were convicted of the lesser charge of robbery with hurt did not detract from the fact that they were acquitted of the charge of murder. At no time did the respondent apply to the court to drop the original charge of murder and substitute a lesser charge instead'.

[11] It is also my considered view that the respondent is not prejudiced if this court were to allow the public prosecutor's appeal at this stage of the trial by reversing the Court of Appeal's decision and calling upon the respondent to make his defence on the original trafficking charge because he would still have the right and the chance to raise a reasonable doubt in the prosecution case. Even if he were to be found guilty and then convicted on the trafficking charges, the respondent would still have his right to appeal to the Court of Appeal and further to the Federal Court. The respondent would still not be deprived of the right provided by the law for the two tiers of appeal (see *Megat Najumuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputera (M) Bhd* [2002] 1 MLJ 385 at p 429).

[12] As stated earlier in my judgment, learned counsel for the respondent had conceded that his appeal is not appealable because the matter had not finally dispose of the rights of the respondent. His only argument was that since the respondent could not appeal, therefore the same should apply to the

prosecution. This means that the respondent's appeal is not competent before us at this stage.

CONCLUSION

[13] For the above reasons, I would allow the public prosecutor's preliminary objection and dismiss the respondent's preliminary objection. It follows that the respondent's appeal is struck out and that the public prosecutor's appeal before us is to be proceeded with.

[14] My learned brothers Alauddin bin Dato' Mohd Sheriff PCA and Zulkefli bin Ahmad Makinudin FCJ have seen this judgment in draft and have expressed their concurrence.

Zulkefli FCJ:

[15] I have read the judgment in draft of my learned brother Hashim bin Dato' Hj Yusoff FCJ and I agree with the decision that the preliminary objection of the public prosecutor be allowed and that of the preliminary objection of the accused be dismissed and his appeal be struck out. I would like to add in and state my views on a pertinent issue arising from these two preliminary objections as follows.

[16] A question that needs to be answered at this stage is whether the accused can in the course of the appeal by the public prosecutor before this court against the decision of the Court of Appeal in calling for his defence of possession and not trafficking of the said drugs challenge that decision through the back door by submitting in the course of his reply to the prosecution's appeal that he should have been acquitted. I would answer this question in the negative. The simple reason is that what the law has precluded the accused from appealing must be given full effect. To allow otherwise would mean providing the accused with an avenue of appeal at this stage contrary to what the law has prohibited. Section 92 of the Courts of Judicature Act 1964 ('CJA') gives the Federal Court a very wide power when it hears an appeal. However, that power can only be exercised subject to s 87 of the CJA, that is the appeal must be competent before the court. On this point we have to relate back to the meaning of the word 'decision'. The word 'any' before the word 'decision' in s 87 of the CJA must be confined to a decision which is final.

[17] Therefore, even if the record of appeal is before the court, the law precludes the court from going into the merits favouring the accused at this stage. A matter of convenience cannot override a substantive prohibition. It

is to be noted that the accused is in no way deprived of the two tiers of appeal after the conclusion of the trial by the trial court. This stand is in line with the decision of the Federal Court in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 wherein Arifin Zakaria FCJ (as he then was) in deciding whether the High Court ought to interfere by way of a revision on a decision of the lower court made pending a trial had this to say:

> In my view, in *Tan Sri Eric Chia*'s case, even the High Court ought not to have interfered in the proceeding pending before the sessions court by calling for a revision. What more in the case of the Federal Court. In a matter such as this, since the decision on the admissibility of evidence was made in a pending case the proper course is to allow the case to proceed to its end and for the issue to be canvassed during the appeal stage.
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> To allow a revision of the decision made by the subordinate court in a pending matter as in *Tan Sri Eric Chia*'s case could lead to delay in the disposal of cases in the subordinate courts.

[18] The Federal Court in *Sia Cheng Soon*'s case has made it clear that the appellate court should not interfere on a matter which has been finally disposed of, a matter which is still pending before the trial court even if the matter has come up before the appellate court.

[19] My learned brothers Alauddin bin Dato' Mohd Sheriff PCA and Hashim bin Dato' Hj Yusoff FCJ, have seen this judgment in draft and have expressed their concurrence.

Appeal by the prosecution allowed. Cross-appeal by the accused struck out.

Reported by Ashgar Ali Ali Mohamed